United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1231

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

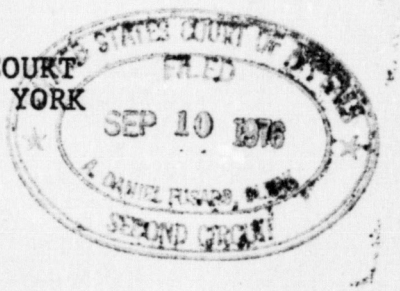
LASZLO JERMENDY,

Defendant-Appellant.

Docket No. 76-1231

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
LASZLO JERMENDY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- LASZLO JERMENDY, Defendant-Appellant.	Docket No. 76-1231

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether it was plain error for the District Judge to charge the jurors that knowledge of the Government's ownership of the property stolen was not an element of the crime charged.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Henry Bramwell) rendered on May 14, 1976, after a jury trial, convicting appellant Laszlo Jermendy of theft of government property having a value in excess of $100 (18 U.S.C. §§641, 2). Appellant Jermendy was sentenced to a term of imprisonment of ten years with a recommendation that the sentence be served concurrently with any sentence imposed under the laws of New York State for any related offense.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment[1]

On October 24, 1975, an indictment was filed charging appellant Jermendy with stealing a government revolver which

---

[1]The indictment is B to the separate appendix to appellant Jermendy's brief.

was in the possession of Secret Service Agent Roland O. Lindsay.

B. The Trial

1. The Government's Case

At trial, Agent Lindsay testified that on June 10, 1975, at approximately 2:30 a.m., he was awakened by a person standing in his room holding a revolver (24[2]). Agent Lindsay identified appellant Jermendy as that person (25). The agent testified that he was then told to go into the living room (29-30, 72). There he saw his roommate, Christopher Ryan, sitting on a couch, and another, unnamed individual holding a knife and standing in front of Ryan (30-31, 73). Both Agent Lindsay and Mr. Ryan were then bound and handcuffed (33-34, 74). Agent Lindsay testified that after the two intruders left the apartment, he discovered that the following items had been taken: the agent's Secret Service revolver;[3] a .38 caliber revolver; two rifles; ammunition; two pocket calculators; a

---

[2]Numerals in parentheses refer to pages of the transcript of the trial.

[3]The indictment charged the theft of this gun.

a tape recorder; two watches; several flight bags; and approximately $300 in cash (40, 50).[4]

Agent Quinn testified that after appellant was arrested on August 27, 1975, he was taken to Secret Service Headquarters (177). There he was stripped and searched twice (172, 201) and interrogated by Agent Quinn. Quinn testified that as a result of this questioning, appellant described his participation in the robbery of Agent Lindsay (184-186).[5]

2. The Defense Case

Appellant Jermendy testified on his own behalf. He denied ever having been in Agent Lindsay's apartment (307). He further testified that after his arrest he was handcuffed and taken by police officers to an unannounced destination (321).

---

[4]At trial, Agent Lindsay's service revolver and holster, a flight bag, various rounds of ammunition, a garment bag, a wristwatch, and a rifle, all taken from the agent's apartment, were entered into evidence (45, 50, 59, 65). These items had been recovered in the course of a search conducted on August 27, 1975, based on a search warrant issued by New York City Criminal Court Judge William M. Booth. (Record on Appeal, Document #12). Appellant was arrested in the premises searched at that time (140).

[5]In addition, James Bartee, a fingerprint specialist employed by the Secret Service, identified appellant's fingerprint as appearing on Agent Lindsay's FAA flight regulation card found in the agent's apartment after the theft (222). Moreover, a stipulation was read to the jury. The stipulation indicated that the suggested retail price of a Model 19 .357 magnum for the period January 17-September 9, 1975, was $157.75 retail, without tax, and $167.50 with tax (304).

Appellant stated that during the course of this ride he was beaten and that one of the police officers opened the door of the moving car, held appellant by his handcuffs, and threatened to throw him from the car (321). Moreover, appellant testified that at Secret Service Headquarters he was stripped, kicked, beaten, and his head smashed against the wall (324-326). Appellant denied telling Agent Quinn that he had robbed two men in a Queens apartment (345).

3. The Court's Charge to the Jury[6]

The District Court instructed the jurors that the Government was required to prove the following essential elements of the crime charged:

> First: That on or about the 10th day of June 1975, within the Eastern District of New York, the defendant did knowingly and willfully steal, purloin and convert to his own use a thing of value of the United States, namely: a .357 magnum Smith & Wesson service revolver, serial number 1K19496;
>
> Second: That the defendant di[d] such act or acts knowingly, intentionally, and willfully, and with the specific intent to deprive the owner of its property, without its consent, which property on the date in question, was in the possession of Roland O. Lindsay, Special Agent of the United States Secret Service;
>
> Third: That the defendant did such act or acts knowingly, willfully, and in-

---

[6]The complete charge is C to the separate appendix to appellant's brief.

tentionally, and with the specific intent to convert the gun to his own use;

Fourth: That the government did suffer an actual loss;

Fifth: That the gun had a value in excess of $100.

(466-467).

Moreover, the District Court specifically told the jurors that in order to convict appellant, the Government need not show that appellant knew the property stolen was owned by the Government:

You are charged as a matter of law that the government is not required to prove that the defendant charged with theft of property of the United States, was aware that the property taken belonged to the United States.

(467).

After jury deliberations, appellant was convicted as charged.

ARGUMENT

THE DISTRICT COURT'S INSTRUCTION TO THE JURORS THAT KNOWLEDGE OF THE GOVERNMENT'S OWNERSHIP OF THE PROPERTY STOLEN WAS NOT AN ELEMENT OF THE CRIME CHARGED WAS PLAIN ERROR.

The District Court instructed the jurors that

> ... the government [was] not required to prove that the defendant charged with theft of property of the United States, was aware that the property taken belonged to the United States.
>
> (467).

By this instruction, the District Court eliminated an essential element of the crime charged, knowledge that the property stolen belonged to the Government. This was plain error requiring reversal. Findley v. United States, 362 F.2d 921, 922-923 (10th Cir. 1966); United States v. Baltrunas, 416 F.2d 401, 402 (10th Cir. 1969); LaBuy, MANUAL OF JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, §§19.01, 19.05 (1965).

In Findley, supra, 362 F.2d at 922-923, and Baltrunas, supra, 416 F.2d at 402, the Tenth Circuit found that this specific knowledge of the governmental source of the stolen property was a requisite element of 18 U.S.C. §641. An examination of the history of this statute and its antecedents clearly demonstrates that the Tenth Circuit's analysis of 18 U.S.C. §641 is correct.

The Reviser's Note to 18 U.S.C. §641 indicates that the

statute was derived from four separate, but related, sections of Federal criminal law, 18 U.S.C. §§82, 87, 100, and 101. In turn, these four sections were based on two earlier statutes, Rev.Stat. §§5438 and 5439, 18 Stat. at L. 479, chap. 144 (March 3, 1875). See Morissette v. United States, 342 U.S. 246, 266 n.28 (1952). The first section of the pertinent statute was almost identical to that subsection under which appellant was convicted. That section read:

> Any person who shall embezzle, steal or purloin any money, property, ... voucher, or valuable thing whatever of the money, goods, ... or property of the United States, shall be deemed guilty of a felony.
>
> 18 Stat. at L. 479, chap. 144 (March 3, 1875).

The second section of 18 Stat. at L. 479, chap. 144, similar to the second subsection of 18 U.S.C. §641, prohibited receipt of goods stolen from the United States knowing them to have been so stolen. 18 Stat. at L., chap. 144, §2. Interpreting this predecessor statute of 18 U.S.C. §641, the Supreme Court held that the crime defined was not the equivalent of the common law offense of larceny, but rather that receipt of stolen government property required specific knowledge of governmental ownership. Kirby v. United States, 174 U.S. 47, 53 (1899); accord, Cohn v. United States, 258 F. 355, 358 (2d Cir. 1919).

There would be no reason for including the requirement that the receiver of stolen goods know that they belonged to the Government without the parallel requirement that the thief

himself have the same knowledge of the source of the goods. Thus, just as the crime of receiving stolen government property requires knowledge that the property belonged to the government, so too the theft itself requires a similar understanding. See Findley v. United States, supra; United States v. Baltrunas, supra.

The successor statute to 18 Stat. at L. 479, chap. 144, §2, and the immediate predecessor to that portion of §641 which prohibits receipt of stolen goods -- 18 U.S.C. §101 (1940 ed.) -- incorporated the language of the statute interpreted in Kirby v. United States, supra, and demonstrated Congress' approval of the Supreme Court's earlier analysis. Although the language of the statute was altered in the most recent revision of the Federal criminal code, this revision was not meant to create new crimes:

> The 1948 revision was not intended to create new crimes, but to recodify those then in existence.
>
> Morrissette v. United States, supra, 342 U.S. at 269, n.28.

Thus, the history of 18 U.S.C. §641 clearly indicates that the statute was not merely a codification of common law larceny, but rather the creation of a new substantive Federal crime, requiring knowledge of the governmental nature of the property involved. Findley v. United States, supra; United States v. Baltrunas, supra; LaBuy, JURY INSTRUCTIONS, supra.

Research indicates that this Court has not dealt with the question of that knowledge required for conviction under 18

U.S.C. §641. While the Tenth Circuit has held that knowledge of governmental ownership is required, other circuits have rejected this principle. United States v. Crutchley, 502 F.2d 1195, 1201 (3d Cir. 1974); United States v. Boyd, 446 F.2d 1267, 1274 (5th Cir. 1971); United States v. Smith, 479 F.2d 1330, 1332-1334 (7th Cir. 1973), cert. denied, 416 U.S. 994 (1974); United States v. Denmon, 483 F.2d 1093, 1094-1095 (8th cir. 1973); Baker v. United States, 429 F.2d 1278 (9th Cir. 1970); United States v. Howey, 427 F.2d 1017, 1018 (9th Cir. 1970). However, these cases are incorrect, since their logic and conclusion are premised on the misconception that §641 was merely a codification of common law larceny. See, e.g., United States v. Howey, supra, 427 F.2d at 1018. In fact, both the legislative history of the statute involved and the relevant Supreme Court analysis shows this not to be the case, but rather that §641 created new Federal criminal law requiring knowledge of the source of the goods (see infra).

In addition, this conclusion is supported by the fact that absent the element of knowledge of the origin of the property, §641 would be identical to crimes punishable under state law.[7] In light of this overlap, a clear statement of Congressional intent is required to extend the ambit of Federal criminal law. See generally United States v. Brecht,

---

[7]Based on the incident charged here, appellant has been convicted of robbery in Supreme Court, Queens County.

Doc. No. 76-1049, slip op. 5031 (2d Cir., July 16, 1976).

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.
>
> United States v. Bass, 404 U.S. 336, 349 (1971).

This clear Congressional purpose is totally lacking here. To the contrary, the history of 18 U.S.C. §641 indicates Congress' intention to punish only those thefts in which the individual charged had knowledge of the governmental ownership of the property taken. Thus, the District Court's elimination of this essential element of the crime for which appellant was convicted is plain error and requires reversal. Fiddlay v. United States, supra; United States v. Baltrunas, supra; LaBuy, JURY INSTRUCTIONS, supra, §§19.01, 19.05.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the indictment dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
LASZLO JERMENDY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

September 10, 1976

CERTIFICATE OF SERVICE

September 10, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Jonathan Silbermann